United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,767

Clifford E. Barnes,

Appellant

v.

United States of America,

Appellee

Appeal from the United States District Court
for the District of Columbia

Brief for Appellant

William A. Glasgow,
Counsel for Appellant,
Appointed by this Court,
916 Union Trust Building,
Washington, D. C. 20005

STATEMENT OF QUESTION PRESENTED

Was it not reversible error for the Trial Court to deny appellant's timely motion to suppress evidence, after hearing the testimony of the Government's witnesses that the arresting officer--one who had arrested appellant on a previous occasion--ran as fast as he could into a restaurant in pursuit of appellant; that appellant backed up against the restaurant bar within an arm's length of the officer; that the officer then had no probable cause to arrest appellant; that subsequently and while appellant was under duress, coercion and physical restraint the officer recovered and identified suspected narcotics in the possession of appellant?

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Jurisdictional Statement

This is an appeal from a judgment and conviction of violation of 26 U. S. C. 4704(a) and 21 U. S. C. 174 (Possession of Narcotic drugs; facilitation, concealment and sale of narcotic drugs, knowing the same to have been imported contrary to law). Jurisdiction is conferred upon this Court by Title 28, Section 1291, United States Code.

Statement of the Case

[All factual references herein, unless otherwise indicated, are to the Transcript of the trial proceedings on June 22, 1964.]

The facts of this case, according to the Government's testimony [1], are as follows:

At about 1:00 A. M. on March 20, 1964 Detective-Sergeant Irwin W. Brewer and Detective Bertram F. Fogle were in an unmarked police car cruising north in the 1900 block of 14th Street, N. W. (Tr. 15, 41). Both officers were attached to the Narcotics Squad and on this occasion they were working in plain clothes (Tr. 15). Officer Fogle was driving and Officer Brewer was a passenger on the door side of the car (Tr. 33). As they approached the O-Aces Restaurant, 1907 -

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[1] At the trial and at the hearing on a Pretrial Motion to Suppress, the defense subpoenaed and produced John W. McNair, owner and operator of the O-Aces Restaurant, whose testimony (Tr. Trial 86-87) (Tr. Motion 8-9), if believed by the Court, unquestionably would have required the suppression of all of the contraband.

14th Street, they observed appellant walking along the street at a distance of about four or five feet from the Restaurant door and about twelve or thirteen feet from the police cruiser (Tr. 33, 34). Appellant was known to both of the police officers, Officer Brewer having arrested appellant on a previous occasion (Tr. 28). In the process of making a preliminary vagrancy observation (Tr. 42) Officer Brewer called to appellant, "Hey, come here." (Tr. 33, 44.) Appellant turned his head towards the cruiser and looked back and then walked rapidly into the O-Aces Restaurant (Tr. 16, 34).

The O-Aces Restaurant is a long narrow room extending 80 or 100 feet in depth (Tr. 49). Approximately 15 or 20 feet inside the front door is a bar built out from the left wall in an L-shape (Tr. 102). Between the front door and the front end of the bar, in the left wall of the room, is a small panel doorway leading to cellar steps. This cellar doorway is about 3 to 5 feet from the end of the bar (Tr. 101). Anywhere from 35 to 50 people were in the Restaurant at the time of this occurrence (Tr. 101).

When appellant turned into the Restaurant, Officer Brewer immediately hopped out of the cruiser and ran as fast as he could into the Restaurant behind appellant

(Tr. 16, 34, 43).[2/]

As Officer Brewer dashed into the Restaurant he observed appellant make a motion towards the cellar door with his left hand as though discarding something, and then back up against the end of the bar about a yard away (Tr. 16-17). Officer Brewer asked appellant what it was that he had thrown, and appellant answered, "Nothing" (Tr. 20). Officer Brewer then pulled wide the partially open door to the cellar, went down one step and picked up a small cream-colored package (Tr. 16, 19). He examined the package and found that it contained 15 capsules of white powder (Tr. 16, 19). Officer Brewer then looked at appellant and told him that he was under arrest for violation of the Harrison Narcotic Act (Tr. 16, 18, 19, 44).

After Officer Brewer left the police cruiser in pursuit of appellant, Officer Fogle parked the cruiser and within one or two minutes entered the Restaurant (Tr. 43, 48). He observed Officer Brewer recover the envelope from the stairway and examine its contents (Tr. 43). Officer Fogle then placed handcuffs on appellant, searched him and removed from his right suit coat pocket a package containing 65 capsules of white powder (Tr. 24-25, 43, 50).

[2/] At the trial Officer Brewer testified that he later found out that appellant knew that the police officer was coming in behind him (Tr. Trial 26). At the hearing on the pretrial motion Officer Brewer testified that his suspicions lead him to believe that appellant thought that the police officer was "right behind him" (Tr. Motion 23).

On May 18, 1964 the Grand Jury returned a four-Count indictment charging appellant with violation of 26 U. S. C. 4704(a), in the First Count as to 15 capsules of narcotics and in the Third Count as to 65 capsules of narcotics; and with violation of 21 U. S. C. 174, in the Second Count as to 15 capsules of narcotics and in the Fourth Count as to 65 capsules of narcotics. On June 5, 1964 a timely pretrial motion to suppress evidence was heard and denied by District Judge Tamm.

This case came on for trial before District Judge Pine without a jury on June 22, 1964. The Government called as its witnesses Officers Brewer and Fogle, both of whom testified as to the arrest of appellant and the recovery of the narcotics. Officer Brewer further testified that the package or envelope that he recovered from the cellar steps, containing 15 capsules, had no tax stamps affixed (Tr. 25). No evidence was adduced as to whether or not the envelope containing 65 capsules had tax stamps affixed.

Government chemist John A. Steele was called by the Government and he testified that, upon chemical examination, both envelopes were found to contain narcotic drugs (Tr. 54-55). Mr. Steele further testified that the drugs contained in the two envelopes could have been produced in this country (Tr. 56-57, 60), and that, with the test he performed, he could not distinguish where they came from (Tr. 65). Upon conclusion of the testimony of Mr. Steele the Government rested its case (Tr. 68).

After the Government rested its case, counsel for appellant moved the Trial Court for judgment of acquittal on Counts II and IV for the reason that the Government had failed to prove that the narcotics in issue were imported contrary to law (Tr. 70-72). Counsel for appellant further moved the Trial Court for judgment of acquittal on Count III for the reason that no evidence had been adduced that the package containing 65 capsules had no tax stamps affixed (Tr. 72). Thereafter the Trial Court allowed the Government to reopen its case for the purpose of proving "what really is a technical point" (Tr. 72), that the envelope in question containing 65 capsules had no tax stamps affixed. The Trial Court denied appellant's motion for acquittal as to each of the three Counts to which the motion was addressed (Tr. 77-78).

Counsel for appellant then put on his case and at its conclusion he renewed his motion to suppress the evidence (Tr. 103). In denying appellant's motion to suppress the Trial Court stated the following facts as grounds for its action (Tr. 115-116):

> "Weighing the evidence, I believe that the facts disclose that Officer Brewer followed the defendant into the Restaurant; he was followed by Officer Fogle; that as the defendant had gotten inside the entrance, Officer Brewer saw him throw something into the cellarway and thereupon stooped down and picked it up, and looked at it and found capsules containing a white substance;

"That the envelope in which the capsules were contained and the capsules in his experience were the kind that frequently were used by peddlers and users of narcotics;

"That thereupon he had probable cause to believe that the defendant had at that moment disposed of contraband, narcotics;

"And at that time he had probable cause to arrest the defendant.

"I believe the evidence discloses those facts and that the arrest did not take place until after he had looked into the envelope and had seen what was in it.

"After having made what I believe was a legal arrest, based on probable cause, he had a right, with the other officer, to search the defendant.

"Then, having found other incriminating evidence, contraband on his person, to take it and use it in this case."

Thereafter, the seized contraband was admitted in evidence and the Trial Court found appellant guilty on each of the four Counts of the indictment (Tr. 120-121). Subsequently, after proof of a prior narcotics conviction, appellant was sentenced to imprisonment for a period of ten (10) years on each of the four Counts of the indictment, said sentences to run concurrently. The Trial Court then ordered that appellant proceed with this appeal without prepayment of costs and that his request for appointment of counsel be referred to this Court. The undersigned was thereafter appointed by this Court as counsel for appellant.

Pertinent Constitutional Provision

Constitution of the United States, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of Point

It was error affecting substantial rights of appellant for the Trial Court to deny appellant's timely motion to suppress evidence, and to admit into evidence the contraband identified as Government Exhibit No. 1, the contents of Government Exhibit No. 2-B, Government Exhibit No. 3-B and its contents, after the Trial Court had heard the Government's evidence which proved that appellant was effectively under arrest at the time that Officer Brewer arrived at the entrance to the O-Aces Restaurant, and thereafter for an appreciable time, before any contraband was seized and identified. There was then no probable cause for the arrest of appellant and the contraband received in evidence, which was recovered after and as a result of such illegal arrest, should have been suppressed.

With respect to this point, appellant desires the Court to read the following portions of the Reporter's Transcript of the Trial

Proceeding on June 22, 1964:

> Testimony of Officer Brewer on Direct Examination, pp. 14-21, on Cross-Examination, pp. 25-30, on Redirect Examination, pp.33-35, and Recross-Examination, p. 38; testimony of Officer Fogle on Direct Examination, pp. 41-45, on Cross-Examination, pp. 48-58.

Summary of Argument

The evidence adduced by the Government at the trial of this case discloses that, in order to make a vagrancy observation, Officer Brewer called to appellant on the street outside the O-Aces Restaurant, "Hey, come here."; that appellant turned his head towards the police cruiser and then hurried into the O-Aces Restaurant, a long narrow room; that when appellant turned into the Restaurant Officer Brewer immediately jumped from the unparked police car in which he was a passenger and dashed into the Restaurant after appellant; that Officer Brewer had arrested appellant on a previous occasion; that when Officer Brewer jumped from the car appellant must have known that Officer Brewer was hot on his heels; that upon entering the Restaurant Officer Brewer observed appellant throw an unidentifiable object which might have been an empty cigarette package; that thereupon appellant backed up against the bar of the Restaurant and was then within an arm's length of the Officer; that subsequently the thrown object was recovered and identified as suspected narcotics; that at the moment Officer Brewer reached the entrance door to the

Restaurant, and at all times thereafter, appellant's liberty was totally restricted, and he knew it; that appellant was then under arrest and that there was no probable cause for such arrest.

Argument

At the time that appellant was arrested, the Arresting Officer had no probable cause to make such arrest.

The Narcotics Officers were well within their rights in calling to appellant on the street in an effort to make a vagrancy observation. Green v. United States, 1958, 104 U. S. App. D. C. 23, 259 F. 2d 23. The fact that appellant ignored their call and turned into the Restaurant certainly would not preclude the Officers from continuing their investigation. The due performance of their duties obviously would suggest that they park the police cruiser, walk into the Restaurant, confront appellant and ask him the questions envisaged by the Vagrancy Statute [3/]. If, in answer to their specific questions the appellant had failed to give a good account of himself, the Officers would then have been at liberty to place him under arrest on a narcotics vagrancy charge. But when Officer Brewer called to appellant on the street, no law required appellant to come over to the cruiser and volunteer the information

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[3/] District of Columbia Code, 33-416a.

referred to in the Vagrancy Statute. Beail v. District of Columbia, 1952, 91 U. S. App. D. C. 110, 201 F. 2d 176; Green v. United States, supra.

So far as the Officers knew, while appellant was on the street he had committed no offense. [4] However, Officer Brewer jumped out of the unparked cruiser and ran "as quick as he could" into the Restaurant in pursuit of appellant. Testifying in this case, Officer Brewer never attempted to explain why he pursued appellant [5], but his actions are mute evidence of his purpose. It is not conceivable that a policeman would jump from an unparked car and dash full speed into a Restaurant for the purpose of posing a few polite questions to a restaurant patron. It is both conceivable and probable that Officer Brewer pursued appellant for the purpose of placing him under arrest for failure to give a good account of himself, even though no questions had been put to him.

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[4] At the hearing on the pretrial motion to suppress, Officer Brewer testified that appellant had committed no felony and no misdemeanor in the presence of the Officers (Tr. Motion, 29).

[5] At the hearing on the pretrial motion to suppress, Officer Brewer testified that he called to appellant on the street in an attempt to make an observation on him, to ask him questions (Tr. Motion, 18-19). He did not state his purpose in pursuing appellant into the Restaurant.

At the moment that Officer Brewer arrived at the entrance to the Restaurant appellant was under arrest. He would have been "rash indeed" to suppose that he could push past Officer Brewer and continue his way down the street unimpeded. Kelley v. United States, 1961, 111 U. S. App. D. C. 396, 298 F. 2d 396; Coleman v. United States, 1961, 111 U. S. App. D. C. 210, 295 F. 2d 555. As the Supreme Court said in Henry v. United States, 1959, 361 U. S. 98, 103:

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Certainly, appellant had reason to believe and did believe that he was then under arrest [6]. Seals v. United States, 1963, _____ U. S. App. D. C. _____, 325 F. 2d 1006. The fact that he immediately attempted to throw contraband out of the view and reach of the arresting officer evidences appellant's belief that he was arrested and that Officer Brewer would search him.

At the precise moment that Officer Brewer reached the front door of the O-Aces Restaurant, appellant was just as effectively under arrest as though he were in handcuffs. The presence of the police officer--one who had arrested appellant on a previous occasion, and this time running

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6/ See footnote 2, page 2 of this Brief.

towards appellant at top speed--was certainly "a formidable type of coercion and duress under color of official authority." Brinegar v. United States, 1949, 338 U. S. 160, 188, Dissent of Mr. Justice Jackson.

But even should this Court entertain any doubt as to whether appellant was effectively restrained and under arrest at the precise moment that Officer Brewer reached the door to the 3-Aces Restaurant, the evidence shows that appellant was positively under arrest for an appreciable time before any contraband was recovered and identified. The evidence discloses that as Officer Brewer entered the door to the Restaurant he saw appellant make a motion with his left hand toward the cellar steps as though throwing something and that at that moment appellant turned with his back to the protruding portion of the L-shaped bar and leaned with his back against the bar facing the officer; that appellant was then within an arm's length of Officer Brewer (Tr. 29); that Officer Brewer could not identify what it was that appellant had thrown and that it might have been "an empty cigarette package" (Tr. 38). Certainly at that moment appellant was under arrest and there was then no probable cause for such arrest. Subsequent to such illegal arrest Officer Brewer asked appellant what he had thrown; turned into the cellar doorway and recovered a package; poured the contents of the package into the palm of his hand and identified it as suspected narcotics.

In no sense had appellant abandoned the temporarily discarded contraband. Immediately upon throwing it he stopped, backed up against the bar and faced the partly opened door where the package lay just three feet away. Rios v. United States, 1960, 364 U. S. 253, 262, footnote 6; Williams v. United States, 1956, 99 U. S. App. D. C. 161, 237 F. 2d 789. On the evidence adduced by the Government in the trial of this case and at the hearing on the pretrial motion to suppress, appellant respectfully submits that the opinion of the Supreme Court in Rios, supra, and the opinion of this Court in Kelley, supra, require the reversal of this case.

Conclusion

A chase is successfully concluded when the object of the chase is caught. Appellant submits that arrest is the obvious purpose of every pursuit by a policeman; and that any pursuit will ripen into an arrest when the pursuing officer boxes-in and traps the one pursued and the one pursued knows that his liberty of movement thereafter is subject to the will of the pursuing and arresting officer. Certainly, under the facts disclosed by the record in this case, appellant was under arrest before the arresting officer had any probable cause to make the arrest. Such arrest having been made without probable cause, all of the contraband thereafter seized should have been suppressed by the

Trial Court on the timely motion of appellant. Having denied appellant's motion to suppress and having received the illegally seized contraband in evidence, the judgment of conviction entered in this case by the District Court should be reversed.

Respectfully submitted,

William A. Glasgow
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916 Union Trust Building
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September 23, 1964.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18767

CLIFFORD E. BARNES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
GERALD E. GILBERT,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Whether there was probable cause for appellant's arrest?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18767

CLIFFORD E. BARNES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a four-count indictment filed May 18, 1964, with violations of federal narcotic statutes, Title 26, U.S.C. § 4704(a), and Title 21 U.S.C. § 174. He waived trial by jury, and was tried by Judge Pine of the District Court. He was found guilty as charged. By judgment and commitment filed June 25, 1964, appellant was sentenced to imprisonment as a second offender for a period of ten years on each count, the sentences to run concurrently. This appeal followed.

Prior to trial appellant moved to suppress the narcotics seized from his person at the time of his arrest. A hear-

ing was held on the pre-trial motion before Judge Tamm of the District Court and the motion was denied. (P-Tr. 42.)[1] Appellant renewed the motion at trial and it was again denied by Judge Pine. (Tr. 116.)

The testimony of the Government witnesses at the pre-trial hearing and at trial was essentially the same concerning appellant's arrest. It revealed that in the early morning hours of Friday, March 20, 1964, Detective Sergeant Irvin Brewer and Detective Bertram Fogle, attached to the Narcotics Squad, Metropolitan Police Department, while on duty were driving in an unmarked police car in the 1900 block of 14th Street, Northwest. At that time they observed the appellant walking in front of 1907 14th Street, Northwest, which was the O-Aces Restaurant. (P-T Tr. 17-18, Tr. 14-15.) Detective Brewer recognized the appellant whom he had arrested for violation of the Harrison Narcotic Act in 1957, and he knew appellant had been convicted for a violation of narcotic laws. (P-T Tr. 18, Tr. 28.) Detective Brewer was going to make a narcotic vagrancy observation on the appellant and he called to the appellant. He did not think the appellant heard him. The appellant glanced back at the police car, quickened his pace, and walked into the O-Aces Restaurant. Detective Brewer got out of the car and also went into the restaurant. Brewer did not know whether the appellant knew he was behind him. As Detective Brewer entered the restaurant he observed the appellant throw something with his left hand toward a cellar doorway and then back up against the bar which was about a yard away. Detective Brewer saw something go through the air and he asked the appellant what he had thrown. Appellant, who had stopped at the bar and was facing Detective Brewer replied, "nothing." Detective Brewer then went over to the cellar doorway where he recovered a small cream-colored package containing 15 capsules of white powder. Detective Brewer examined the package

[1] P-T Tr. refers to the transcript of the pre-trial motion, and Tr. refers to the transcript of the trial.

and subsequently placed the appellant under arrest. (P-T Tr. 17-20, 23, Tr. 16-21, 26, 28, 42.) Detective Fogle parked the police car and came into the restaurant after Detective Brewer. As Detective Fogle entered he saw Detective Brewer reach down on the landing of the cellar doorway and pick up the small cream-colored envelope, shake out the capsules containing white powder, and proceed to arrest the appellant. Detective Fogle joined Detective Brewer after the latter had arrested the appellant, and made a search of appellant's person which revealed another cream-colored package similar to the first package, containing 65 capsules of white powder. (P-T Tr. 20, 27, Tr. 24-25, 40-44.)

Detective Brewer identified the envelope and capsules which he recovered from the cellar doorway, at trial. He said that he had turned the capsules over to Mr. Steele, United States Chemist, for analysis. (Tr. 22-24, 36-38.) Detective Brewer also testified that the envelope he recovered from the doorway did not contain any tax stamps, or any other stamps. (Tr. 25.) Detective Fogle identified the envelope containing 65 capsules of white powder which he seized from the appellant at the time of appellant's arrest. He said that he had also turned the capsules over to Mr. Steele. (Tr. 45-46.) Detective Fogle further testified that the envelope containing the 65 capsules which he seized from the appellant did not contain any stamps of any kind. (Tr. 74.)

John Steele, chemist for the Internal Revenue, was qualified as an expert concerning narcotics. (Tr. 51-53.) Mr. Steele said that he had analyzed the 15 capsules which Detective Brewer recovered from the doorway, and also the 65 capsules Detective Fogle seized from the appellant. Mr. Steele stated that the quantative weight of the white powder in the 15 capsules was 850 milligrains, and the 65 capsules contained 2.15 grams. Mr. Steele's analysis of the white powder from all of the capsules resulted in a finding of heroin hydrochloride, which is a derivative of opium, a narcotic drug, also quinine hydrochloride, man-

nitol, and milk sugar. (Tr. 53-55.) Mr. Steele also testified that in his opinion the heroin in the capsules was not produced in the United States. (Tr. 58, 61.)

Mr. John McNair, owner of the O-Aces Restaurant, testified in behalf of the appellant at the pre-trial hearing on the motion to suppress, and also at trial. Mr. McNair said that the officers arrested appellant before they recovered any narcotics. (P-T Tr. 8-10, Tr. 86-87.) He said that he was not watching the appellant when Detective Brewer entered the restaurant. (P-T Tr. 15, 94.) Mr. McNair admitted that he knew many narcotic addicts and that they came into his restaurant every day. The appellant came into his restaurant three or four times a week. (P-T Tr. 12.)

The envelopes and capsules recovered by Detectives Brewer and Fogle, were received into evidence, over defense counsel's objection. (Tr. 117.) Appellant was found guilty as charged. (Tr. 120-121.)

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides in pertinent part:

> *Same: penalty: evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 U.S.C. § 4704(a)—General requirement provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SUMMARY OF ARGUMENT

The mere presence of a police officer and his observation of appellant did not constitute an arrest. Eventually the officer did arrest the appellant, however, the totality of circumstances which occurred prior to that arrest reveal that the officer had abundant probable cause. The officer knew that he had arrested the appellant previously for violation of the Harrison Narcotic Act, and that appellant had a narcotic conviction. The officer called to the appellant on the street. The appellant turned and looked in the officer's direction, and then hastily entered a restaurant which was open to the public. The officer thought the appellant may not have heard him, and followed the appellant into the restaurant. Immediately upon entering he saw the appellant throw a small package through a cellar doorway of the restaurant. He asked the appellant what he had thrown, and the appellant replied, "nothing." The officer recovered the abandoned package which appellant had discarded and disclaimed, and it contained 15 capsules of white powder. The subsequent arrest was valid.

ARGUMENT

There was abundant probable cause for appellant's arrest.

(P-T. Tr. 17-20, 23, 27. Tr. 14-21, 24-26, 28, 40-44.)

Detective Sergeant Irvin Brewer, and Detective Bertram Fogle, attached to the Narcotics Squad, Metropolitan Police Department, while on duty on Friday, March 20, 1964, were driving in the 1900 block of 14th Street, Northwest. At that time they observed the appellant walking in front of 1907 14th Street, which was the O-Aces Restaurant. (P-T Tr. 17-18, Tr. 14-15.) Detective Brewer recognized the appellant whom he had arrested before for a violation of the Harrison Narcotic Act, and he knew that appellant had been convicted of a narcotic violation. (P-T Tr. 18, Tr. 28.) Detective Brewer was going to make a narcotic vagrancy observation on the appellant who was about 12 or 13 feet away from the unmarked police car and 4 or 5 feet away from the restaurant, and he called to the appellant. Detective Brewer did not think appellant heard him. The appellant glanced back in Brewer's direction, but he quickened his pace and walked into the O-Aces Restaurant. Detective Brewer got out of the car and also went into the restaurant. Detective Brewer did not know whether the appellant was aware that he was behind the appellant. As Detective Brewer entered the restaurant he observed the appellant throw something with his left hand toward a cellar doorway and then back up against the bar which was about a yard away. Detective Brewer saw something go through the air and he asked the appellant what he had thrown. Appellant, who had stopped at the bar and was facing Detective Brewer replied, "nothing." Detective Brewer then went over to the cellar doorway where he recovered a small cream-colored package containing 15 capsules of white powder. Detective Brewer examined the package and subsequently placed appellant under arrest. (P-T

Tr. 17-20, 23, Tr. 16-21, 26, 28, 42.) Detective Fogle, after parking the car, came into the restaurant. Upon entering he saw Detective Brewer pick up the envelope from the cellar doorway, examine its contents and arrest the appellant. Detective Fogle joined Detective Brewer after appellant was arrested, and searched the appellant's person which revealed another cream-colored package, similar to the first one, containing 65 capsules of white powder. (P-T Tr. 20, 27, Tr. 24-25, 40-44.)

Appellant contends that when Detective Brewer arrived at the entrance of the restaurant appellant was under arrest without probable cause and therefore the seizure of narcotics was invalid. Appellant concedes that the officer was within his rights in calling to him and attempting to make a narcotic vagrancy observation pursuant to D. C. Code § 33-416(a) (1961), (p. 9, appellant's brief.); *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958). Appellant's entire contention is based on the factual situation that Detective Brewer ran the short distance from the police car to the restaurant, after appellant had entered the restaurant. When Brewer entered he observed appellant throw something and then turn around with his back to the bar. It is at that point appellant argues that he was under arrest. There was no testimony that appellant was aware that Brewer was behind him or that appellant was aware that Brewer was behind him or that appellant had submitted to Brewer in any way, or was of the opinion that his freedom had been restricted. Detective Brewer testified that he did not arrest the appellant until after he observed the incriminating contents of the package appellant had thrown. (P-T Tr. 19-20, Tr. 16, 19).

This Court said in *Kelley* v. *United States*, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961), that an arrest can occur if the person arrested understands that he is in the power of the one arresting, and submits in consequence. In the instant case there is nothing in the record to indicate what the appellant understood. Appellant is now

asking this Court to find the mere presence of a police officer constituted an arrest, notwithstanding that nothing was said or done in any way by the officer other than being present and observing appellant. No case has ever supported such a position, and for good reason because it is totally lacking in merit.

There is no question, and appellant does not contest it, that the events which occurred subsequent to the aforementioned factual situation appellant relies upon for his argument, gave rise to probable cause. Appellant concedes that he attempted to throw the contraband out of the view and reach of the officer. (p. 11, appellant's brief.) However, appellant was obviously not successful in his attempt. Detective Brewer's inquiry as to what appellant, a known narcotic violator, had thrown, was proper and warranted by the circumstances. *Freeman* v. *United States*, 116 U.S. App. D.C. 213, 322 F.2d 426 (1963); *Keiningham* v. *United States*, 113 U.S. App. D.C. 294, 307 F.2d 632 (1962). Appellant's reply of "nothing" followed by Brewer's recovery of the package he saw appellant throw,[2] which contained 15 capsules of white powder, gave Detective Brewer abundant probable cause for arrest. *Freeman* v. *United States, supra; Keiningham* v. *United States, supra; Bell* v. *United States*, 102 U.S. App. D.V. 383, 254 F.2d 82 (1958); *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953); *cf. Draper* v. *United States*, 358 U.S. 307 (1959).

Two different judges ruled on appellant's motion to suppress and each heard testimony. It is clear that their

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[2] Appellant argues that the contraband he discarded was not abandoned. This is interesting in light of the fact that there is no question that he discarded it by throwing it through a cellar doorway of a restaurant open to the public, and then when asked about it, he disclaimed it. (Tr. 19-20.) *Keiningham* v. *United States, supra; Hester* v. *United States*, 265 U.S. 57 (1924). Of course even if it were held that there was no probable cause for appellant's arrest, that would not effect the conviction concerning the abandoned narcotics, and since the sentences were concurrent that would make the issue here academic. *Hirabayshi* v. *United States*, 320 U.S. 81 (1943). But *cf. Smith* v. *United States*, —— U.S. App. D.C. ——, 335 F.2d 270 (1964).

denials were proper, and that there was no abuse of discretion.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
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